We have noted what Azmi J. said in *Public Prosecutor* v. *Lim Chen Len*[1] concerning the admissibility of evidence in support of defence of alibi and we are of the view that he decided correctly. If a trial court having considered the evidence put forward by the defence holds that such evidence amounts to evidence in support of an alibi for which no notice under section 402A Criminal Procedure Code has been given, then he has no discretion in the matter but to exclude such evidence. In this respect we agree that a distinction can be drawn between the provisions in our Criminal Procedure Code and section 11(1) of the English Criminal Justice Act 1967. It is nonetheless significant to note that section 11(8) of the Criminal Justice Act defines "evidence in support of an alibi" to mean "evidence tending to show that by reason of the presence of the defendant at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission," whereas our section 402A does not so define but merely provides that "where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support thereof". The meaning of tne words "evidence in support thereof" under section 402A(1) cannot, in our view, be said to differ from that assigned by section 11(8) of the English Act.

A determination whether particular evidence is evidence in support of alibi entails a consideration whether the evidence shows or tends to show that by reason of the presence of the accused at some particular place or area at a particular time he cannot be or is unlikely to be at the place where the offence is committed. It is difficult if not impossible to envisage with reference to a particular charge what evidence amounts or does not amount to evidence in support of a defence of alibi. It depends very much on the facts of each particular case. It has been described that "What is ordinarily meant by an alibi is that the accused's presence elsewhere is essentially inconsistent with his presence at the time and place alleged, and therefore with participation in the crime. An alibi may absolutely preclude the possibility of presence at the alleged time and place of the act; or the alibi may not involve absolute impossibility, but only high improbability and yet be convincing." (see *Criminal Law Review* 1978 pp. 277-8 and also on p. 278 where it is further stated that "a true alibi defence consists of a affirmative proof of the defendant's presence somewhere other than at the time and place alleged.").

With reference to question (1), we are constrained to observe that although the charge has not stated exactly when the offence was committed during the months of May and June 1978 it has nevertheless specifically defined the time and place sufficiently to enable the applicant to answer the charge. The applicant did not put forward any alibi defence. It was in essence a complete denial of the prosecution case. The appellate judge quite rightly treated it as purely a question of fact. That being the case, we are unable to hold that the question posed is one of law within the scope of section 66(1) of the Courts of Judicature Act 1964. As for the present application, it is our considered view that no question of law arose in the course of the appeal and there cannot therefore be any question of law that has affected the event of the appeal. Question (2) is dependent upon question (1) and the determination of this question therefore does not arise.

The application is dismissed.

Application dismissed.

Solicitors: *Abdul Rahman Saad & Associates.*

PIANG HONG YON & ORS. v. SYARIKAT SERI BELIAN SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.JJ.) July 10 & December 5, 1981]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 71, 140, 141, 142, 143 & 144 of 1980]

Land Law — Caveat — Subdivided lots in land sold — No transfers executed — Claim that whole of land had been transferred to respondent — Vendor denying validity of transfer — Caveats entered by purchasers of sub-lots — Application to remove caveats — Serious question of fact and law to be tried.

In this case the vendor the registered proprietor of a large piece of land had sold subdivided lots to a number of purchasers including the appellants. No memorandum of transfer had been executed. Subsequently the respondent claimed to have bought the whole of the land from the vendor and he had a memorandum of transfer of the land to him. The vendor denied the validity of the transfer. The purchasers of the sub-divided lots entered caveats on the land and so the memorandum of transfer could not be registered. The vendor and some of the purchasers of the sub-lots brought a suit against the respondent claiming that the purported transfer of the land to the respondent was null and void as it was obtained by fraud. The respondent applied to have the caveats removed and in separate actions brought by him against the appellants, Ajaib Singh J. ordered the caveats to be removed. The appellants appealed.

Held: (1) there were serious questions of fact and law which arose in this case and the learned Judge was not entitled to reach a finding that the respondent was truly the registered owner without a proper trial of the issues;

(2) in the circumstances the caveats should remain to await the outcome of the civil suit against the respondent.

FEDERAL COURT.

H.B. Ball (*R.R. Chelvarajah* with him) for all the appellants, except F.C.C.A. No. 144/1980.

Edgar Joseph for appellant in F.C.C.A. No. 144/1980.

Tara Singh Sidhu for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): These six appeals arose from two decisions of Ajaib Singh J. in which he allowed the respondent's applications to remove private caveats entered on a piece of land held under Holding No. 31 and Holding No. 41 of Malacca Town IV. The appellants, unhappy with the decisions appealed to us. For the purpose of these appeals it is convenient to set out the facts as follows.

The land-Holding No. 31 and Holding No. 41 — was owned and registered in the name of Seet Tiam

Hock (herein this judgment referred to as the Vendor). He is also one of the appellants. Between March 3, 1976 and July 30, 1976 he sold under a scheme to sub divide the land into several subdivided lots to five purchasers, namely to (1) Piang Hong Yong, (2) Lee San Poh alias Lee Lai Choon (3) Tan Yee Seng (4) Tan Lui Beeng alias Tan Leong Min and (5) Lee Swee Kwee. Although these purchasers were given possession of their proposed subdivided lots, no memorandum of transfer was executed and so the vendor still remained the registered owner of the land. Between October 2, 1978 and November 15, 1978, three other purchasers, namely (1) Tan Swee Liew (2) Khoo Kim Seng and (3) Choo Kwee Lan bought some other proposed subdivided lots. As a result of this one more proposed subdivided lot remained unsold with the vendor. This second batch of purchasers too entered into occupation of their respective subdivided lots and like the previous five purchasers executed no memorandum of transfer also. Their rights as well as those of the previous five purchasers were thus based on the sale agreements which they entered into with the vendor. On January 11 and 12, 1979, purchasers Piang Hong Yong and Lee San Poh entered caveats on the land and on December 14, 1979, purchaser Khoo Kim Seng did likewise. On February 27, 1980 three other purchasers, namely Tan Swee Liew, Choo Kwee Lan and Tan Kim Koh followed suit. Even the vendor himself entered his caveat to protect the unsold proposed subdivided lot on February 25, 1980. Three purchasers, namely Tan Yee Seng, Tan Lai Beng, Lee Swee Kwee did not enter any caveats.

Meanwhile on July 7, 1978 the respondent became the registered owner of Holding No. 31 by virtue of a memorandum of transfer on the same date, purported to be executed in its favour by the vendor for a consideration of $120,000 in cash. Subsequently on November 4, 1978 the respondent charged this Holding to Hongkong & Shanghai Banking Corpn. as collateral for loan. In addition to this memorandum, there was another memorandum of transfer dated November 11, 1978 in respect of Holding No. 41 purported to be executed by the vendor in favour of the respondent for a consideration of $25,000 of which $4,000 was in cash and $21,000 in a cheque. This memorandum was not registered because the caveats lodged on January 11, and 12, 1979 by purchasers Piang Hong Yon and Lee San Poh appeared to cover not only Holding No. 31 but also Holding No. 41.

Having been aware of and having been notified by the Registrar of Titles Malacca of the caveats entered by the above-mentioned purchasers, the respondent filed in Muar High Court six originating motions namely (1) OM No. 7/1979 against Piang Hong Yon and Lee San Poh (2) OM No. 3/1980 against Khoo Kim Sem (3) OM No. 4/1980 against Tan Swee Liew (4) OM No. 5/1980 against Choo Kwee Lan (5) OM No. 6/1980 against Tan Kim Koh (6) OM No. 7/1980 against the vendor personally Seet Tian Hock, applying to the court to remove the caveats on the ground that the respondent had purchased the land from the vendor personally for $120,000 on July 7, 1978 and had since become the registered owner. O.M. No. 7/1979 was filed on October 7, 1979 and heard separately on February 24, 1980 and after the judgment given in its favour the respondent filed the other five O.Ms. on March 9, 1980. These five O.Ms. were heard together on May 11, 1980 and common judgment in favour of the respondent was delivered ten days later.

The caveats which the respondent sought to remove were all lodged after the vendor had received a letter from his solicitors, Messrs. Sault & Co. in January 1979 informing him that Holding No. 31 was already registered in the respondent's name. The vendor denied that he ever sold the land to anyone or to the respondent. He also denied that he ever executed a memorandum of transfer of this Holding in favour of the respondent. He alleged that the transfer was a fraud. Presumably it must have been due to the surfacing of this information that the purchasers lodged caveats against the land in order to protect their interests. In addition thereto, the five purchasers who bought the proposed subdivided lots in 1976 together with the vendor filed a civil suit in Malacca High Court (C.S. No. 126/1979) on December 14, 1979 claiming, among other things, a declaration that the purported transfer of land to the respondent on July 7, 1978 is null and void as it was obtained by fraud.

Whilst this Civil Suit was pending, the respondent's O.M. No. 7/1979 filed in Muar on October 7, 1979 came before Ajaib Singh J., sitting at Muar on February 24, 1980. An application made by counsel for the appellants to have the motion transferred to Malacca High Court as the land and the appellants are in Malacca was refused by the learned judge, who finally gave his decisions on February 24, 1980 allowing the respondent's application in terms of its motion — i.e. to remove the caveats lodged by the purchasers Piang Hon Yon and Lee San Poh.

Presumably encouraged by this success, on March 9, 1980 the respondent filed in five other Originating Motions, i.e. O.M. 3/80, O.M. 4/80, O.M. 5/80, O.M. 6/80 and O.M. 7/80, against other purchasers and the vendor. These five O.Ms. were heard together by the same learned judge on May 11, 1980 and common judgment on all of them was given on May 21, 1980 in favour of the respondent — i.e. the caveats lodged by these purchasers had to be removed.

Before us, the appeals on all these six Originating Motions were heard together. In the court below the learned judge ignored the submission of counsel for the purchasers in O.M. No. 7/1979 that there were serious questions to be tried and that therefore the caveats should be allowed to remain in order to preserve the *status quo* at least until the Malacca Civil Suit No. 126/1979 was tried. Undoubtedly the learned judge was confronted with a choice between the rights of the respondent and those of the purchasers. Both appear to be innocent purchasers from the vendor except that only the respondent had become the registered owner. The learned judge preferred the respondent for obvious reasons — i.e. because the respondent who purchased the entire Holding No. 31 had become its registered owner whilst the purchasers who had purchased only the proposed sub-divided lots — their rights being based on agreements with the vendor — could not compete with the respondent's rights and were left to seek their own remedy against the vendor himself. Such being the case, they have no register-

able interest to maintain these caveats. In so holding the learned judge must necessarily have upheld the authenticity of the memorandum of transfer by virtue of which the respondent became the registered owner of Holding No. 31, but which memorandum was alleged by the vendor to be a forgery and the transfer was therefore invalid. This is a serious question of fact and law which should be gone into. The learned judge in coming to the conclusion as he did took for granted without questioning as authentically executed by the vendor the following documents:

(1) Memorandum of transfer dated July 7, 1978 and December 8, 1979 relating to Holding No. 31 and Holding No. 41 respectively,

(2) Statutory declaration dated June 15, 1978 purported to be sworn by the vendor that he had lost or misplaced without trace the issue document of title to Holding No. 31 in question and thus with the replaced document of title this holding became registered in the respondent's name,

(3) Letter dated August 12, 1978 addressed to Goh Soot Hwang & Co., Advocates & Solicitors purported to be signed by the vendor inquiring about his liability to Property Gains Tax on the sale of Holding No. 31 to the respondents,

(4) Notification of disposal of chargeable assets required under section 57 of the Real Property Gains Tax Act 1976 dated August 12, 1978 and December 8, 1978 in respect of Holding No. 31 and Holding No. 41 respectively, and

(5) A Hongkong & Shanghai Banking Corpn. cheque No. 535135 dated December 8, 1978 for $21,000 drawn by the respondent in favour of the vendor as part payment for the sale of Holding No. 41.

Prima facie these documents appear to have been executed by the vendor, but in view of the allegations of fraud raised by him, these documents should not be accepted on their face value. The cheque was made in the name of the vendor, but no photo copy of the reverse side of the cheque was displayed so as to show who signed it as cash recipient when the cheque was cashed. There was, however, a hearsay evidence to this effect in the affidavit of Encik Abdul Aziz bin Daud sworn on behalf of the respondent on January 25, 1980. Paragraph 8 of this affidavit says:

"8. Further Seet Tian Hock had on February 28, 1979 (this I learnt from our Bankers Hongkong & Shanghai Bank) after what he says the shock and surprise cleared our cheque marked 'AA 10' for $21,000 being the balance for purchase price of lot 41 which is in front of Lot 31."

In view of the allegations of fraud and the denial by the vendor that he sold these two holdings to the respondent, this hearsay evidence should not likewise be accepted.

The serious issue of fact and law to be tried in all these Originating Motions under appeal was one as to whether the vendor had sold the two holdings, namely Holding No. 31 and Holding No. 41 to the respondent. The respondent said he did, but the vendor said he did not. The affidavits filed by the parties are not in agreement. They are conflicting with one party contending one version whilst the other swore to the contrary. The documents on which the respondent relied as proof that the vendor did were disclaimed by the vendor as having been executed by him, and so should not have been relied upon by the learned judge to come to a final decision. In our view the learned judge was not entitled to reach a finding that the respondent was truly the registered owner without a proper trial of the issue. This question should be settled by proper evidence, which no doubt could be given and gone into when the trial of Malacca Civil Suit No. 126/1979 will be held. The existence of these caveats does in no way decide the rights of the respondent and those of the purchasers. They exist simply to maintain the *status quo* until the issue of fraud is settled. The respondent will not be in anyway prejudiced, although it may not be able to deal with these holdings as they wish to. Such impedient is not a real prejudice to the respondent as this is always a risk which any person takes or incurs when buying and selling property, even from or to a close friend.

In view of the conclusion we reach in these appeals, we do not consider it necessary for us to go into the question of indefeasibility of title under National Land Code (Penang and Malacca Titles) Act 1963, although counsel for both sides made some oral and lengthy written submissions on the subject. The question is premature at this stage of the proceedings.

In conclusion, we allow the appeals with costs and order that these caveats should remain to await the outcome of the Malacca Civil Suit No. 126/1979. For this reason we hope that this civil suit should be tried as soon as possible.

Appeal allowed.

Solicitors: *Sault & Co.; Tara Singh Sidhu & Co.*

MALAYAN BANKING BHD. v. AGENCIES SERVICE BUREAU SDN. BHD. & ORS.

[F.C. (Wan Suleiman Ag. C.J., Salleh Abas F.J. & Mohamed Azmi J.) December 7 & 18, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 207 of 1980]

Practice and Procedure — Document not adequately stamped — Guarantee — Power of court to impound document and order it to be admitted on payment of appropriate penalty — Point not raised in lower courts — Costs.

Stamp — Guarantee — Document not adequately stamped — Power of court to impound document and order it to be admitted on payment of appropriate penalty — Stamp Ordinance, 1949, ss. 52(1) & 53.

Evidence — Unstamped document — Guarantee — Power of court to impound document and order it to be admitted on payment of appropriate penalty.

In this case the appellant sued the respondent based on a guarantee given by the respondents in consideration of the appellant giving overdraft facilities to the first respondent. The guarantee was dated on April 17, 1974 but it was argued that it was in fact executed on November 16, 1973. The learned President of the Sessions Court after hearing the evidence was in real doubt as to when the guarantee was signed and he held that the plaintiff had failed to prove that the guarantee was valid and he dismissed the claim. On appeal it was held in the High Court that the guarantee was in fact executed on November 16, 1973. Hashim Yeop A. Sani J. held that as the penalty for late stamping had not.